No. 3944 In Equity

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Appellee,

v.

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR APPELLANTS

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STATEMENT OF THE CASE.

The appellee alleges in his complaint in substance that during the recent World War, and prior thereto, a great many workmen, who were alien

enemies in the State of Washington, were killed while engaged in extra hazardous occupations, which entitled their beneficiaries to a pension by virtue of the Workmen's Compensation Act of the State of Washington, being chapter 74, Laws of 1911 of Washington, and section 6604-1, *et seq.,* Rem. 1915 Code. The complaint further alleges that such beneficiaries lived in countries with which the United States was at war and for this reason the warrants here involved and which were made payable to the beneficiaries were not delivered to them. After a considerable space of time, the Department of Labor and Industries of the State of Washington, which department has charge of administering the Accident Fund created by the Workmen's Compensation Act, ceased to issue warrants payable to such beneficiaries, inasmuch as delivery thereof was impossible.

During the war, the alien property custodian, appellee herein, after an investigation, determined that the State of Washington had moneys in its possession belonging to alien enemies and made a demand upon the Department of Labor and Industries that such moneys be turned over to him. This demand was not complied with, and on or about August 1st, 1922, the alien property custodian, appellee herein, sued the State of Washington, Edward Clifford, Superintendent of the Department of Labor and Industries, and E. S. Gill, Supervisor of the Industrial Insurance Division, in the district court, praying that an order be issued directed to the United

States Marshal, directing him to seize the warrants here involved which were already issued, and that an order be issued citing the appellants to appear at a certain time and show cause why they should not deliver forthwith to the appellee the said warrants, and pay over to him the various amounts shown in the schedule attached to the complaint, and that all of the warrants and moneys described in the schedules attached to the complaint should be paid over to the appellee. The motion to dismiss was filed against this original complaint on the theory, among other things, that the district court had no jurisdiction of a suit against the state. This motion was sustained as to the State of Washington, and denied as to the other appellants, it being the theory of the learned court that the district court did not have jurisdiction of an action against the state, and therefore the state was dismissed from the action, but it was also the court's theory that the action, in so far as it was directed against Edward Clifford, Superintendent of Labor and Industries, and E. S. Gill, Supervisor of Industrial Insurance, was not in fact an action against the state. An amended complaint was then filed, practically similar to the original, except that the State of Washington was omitted as a defendant. A motion to dismiss was filed by the appellants, directed against the amended complaint, on the theory that the district court has no jurisdiction of this action as it was in reality a suit against the state and that the Trading with the Enemy Act, being chapter

106, Volume I, United States Statutes at Large, page 411, under the authority of which appellee instituted this action, does not apply to a state. This motion was denied by the district court and, the appellants having refused to plead further, a judgment was entered in conformity with the prayer of the complaint from which this appeal is taken.

SPECIFICATIONS OF ERROR.

I

The court erred in denying appellants' motion to dismiss the bill of complaint, for the reason that said court did not have jurisdiction of the appellants or the subject matter of the action.

II

The court erred in entering judgment in favor of the appellee and against the appellants, for the reason that said court did not have jurisdiction of the appellants or the subject matter of the action.

ARGUMENT.

I

The District Court Has No Jurisdiction of An Action Against a State.

Rev. Stat. section 687, Act of September 24, 1789, c. 20, sec. 13, 1 stat. 80, provides as follows:

"The supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction."

In construing this section, in the case of *United States v. Texas,* 143 U. S. 621 (643), the court said:

"That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.' Rev. Stat. Sec. 687; Act of September 24, 1789, c. 20, sec. 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?"

Again, in the case of *Title Guaranty & Surety Company v. Guernsey,* 205 Fed. 94, the court said (p. 95):

"(1) It is a fundamental rule of public law that a sovereign state cannot be sued without its consent, and that no judgment can be entered against it in any court without express legislative authority therefor. In recognition of this elementary principle article 2, sec. 26, of the Constitution of the State of Washington declares:

" 'The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.'

"And the Legislature has provided that such suits shall be begun in the superior court of Thurston county. 1 Rem. & Bal. Code, sec. 886. In the face of these provisions and article 11 of the amendments to the Constitution of the United States, it is idle to assert that this court has jurisdiction of a suit against the state, or that it can enter any judgment whatever against it. *Stanley v. Schwalby,* 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960.

"(2) It would have, perhaps, been more seemly had the Attorney General challenged the jurisdiction of the court at the threshold; but the immunity of the state from suit can only be waived by the Legislature, and it is in no manner bound or estopped by the acts of its officers. As said by the court in *Stanley v. Schwalby, supra*:

" 'Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers.' "

Section 17 of the Trading with the Enemy Act, approved October 6, 1917, found in Volume 40, part I, page 411, Statutes at Large, reads as follows:

"That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court, as provided in sections 128 and 238 of the Act of March 3, 1911, entitled 'And to codify, revise and amend the laws relating to the judiciary.' "

There may be some contention that this repeals Rev. Stat. section 687, *supra,* but it will be noticed that there is no express repeal anywhere in the Trading with the Enemy Act, *supra.* However, the rule of law is well settled that repeals by implications are not favored in law and there must be such a manifest and total repugnance that the two enactments cannot stand before a repeal by implication will be allowed. This rule is well stated in section 247, Volume I, Lewis Sutherland's Statutory Construction, as follows:

"When some office or function can, by fair construction, be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject * * *. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or when in the latter statute some express notice is taken of the former plainly indicating an intention to repeal it, and where two acts are seemingly repugnant they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication."

Manifestly, there is no such repugnance, or notice in the latter statute of the former indicating an intention to repeal it, between a statute which gives the United States Supreme Court exclusive jurisdiction of cases in which the state is a party and a statute which gives district courts jurisdiction to enforce the provisions of the Trading with the Enemy Act.

II

This Is An Action Against the State of Washington.

The Workmen's Compensaton Act of the State of Washington was enacted by virtue of the police power, and its constitutionality was sustained on that ground. *State v. Mountain Timber Company,* 243 U. S. 219. The preamble to chapter 74, Laws of 1911, is as follows:

"An Act relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the non-observance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and, except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595 and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employes in factories, mills or work-

shops where machinery is used, actions for the recovery of damages and prescribing a punishment for the violation thereof."

Section 1, chapter 74, Laws of 1911, being section 6604-1, Rem. 1915 Code, contains a declaration of policy reciting that the common law system governing the remedy of workmen against employers for injuries received in hazardous work, is inconsistent with modern industrial conditions and in practice proves to be economically unwise and unfair. That the remedy of the workman has been uncertain, slow and inadequate, that injuries in such employments, formerly occasional, have become frequent and inevitable, and that the welfare of the state of Washington depends upon its industries, and even more upon the welfare of its wage workers, "the state of Washington therefore exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 2 provides that while there is hazard in all employment, certain employments have come to

be and are recognized as being inherently constantly dangerous. Such employments are designated as "extrahazardous," and those included within the act are enumerated in section 2.

The third section contains a definition of terms not here important.

Section 4 contains a schedule of contribution classifying the industries under the act in the degree of their award, and specifying the percentage that such industries shall pay as premiums on their payrolls, into a fund designated as the accident fund.

Section 5 contains a schedule of the compensation to be awarded out of the accident fund, which is the fund composed of the premiums paid in by virtue of section 4 to each injured workman or to his family or dependents, in case of his death, and declares that except as in the act otherwise provided, such payment shall be in lieu of any and all rights of action against any person whatsoever.

Section 8 provides that in case any employer shall default in any payment to the accident fund, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy.

Section 10 provides that no money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor even

be taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law.

Section 12 provides for the filing of claims by the injured workman or his dependents or beneficiaries in case of his death, and provides that no application shall be valid unless filed within one year after the date upon which the injury occurred or the right thereto accrued.

Section 20 provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act, may have the same reviewed by a proceeding for that purpose in the nature of an appeal initiated in the superior court of the county of his residence.

Section 21 creates a department to administer the act.

Section 24 provides that the department shall have power to promulgate certain rules for the purpose of administering the act.

Section 26 provides that disbursements out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and audited by him, and that the state treasurer shall pay every warrant out of the fund upon which it is drawn. It also provides that the state treasurer shall be liable upon his official bond for the safe custody of the moneys and securities of the accident fund, "but all the provi-

sions of an act approved February 21, 1907, entitled 'An act to provide for state depositories and to regulate the deposits of state moneys therein,' shall be applied to said moneys and the handling thereof by the state treasurer."

Section 29 appropriates the sum of $1,500,000.00 out of the general fund for the administrative expenses of the department in administering the act.

Section 31 provides that in case the act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be approved by the legislature.

The accident fund is, in fact, a public fund and partakes "of the dual nature of a tax for revenue and a tax for the purposes of regulation." *State v. Mountain Timber Co., supra.* This fund is thus derived from involuntary contributions exacted by the state under its police power, and partakes of the nature of a tax. The sections of the workmen's compensation act referred to, *supra,* show clearly that it is, in fact, a public fund, as it is kept by the state treasurer, disbursed only on state warrants in the manner provided by law. In case an employer defaults in his payments, an action may be maintained against him in the name of the state of Washington for the purpose of collecting these premiums. In case the workmen's compensation act shall be repealed, the moneys in the accident fund could only be disposed of by the state legislature. The accident

fund may also be used for the purpose of paying the administrative expense of the department of labor and industries, as shown by the general appropriation act of 1921, being chapter 155, Laws of 1921, which reads, in part, as follows:

"Director of Labor & Industry:

"Salary of Director	$ 15,000.00
Salaries and Wages	323,225.00
Supplies, Material and Services	160,927.00
Capital Outlays	6,995.00
Total from General Fund	$506,147.00"

From Accident Fund.

"Salaries and Wages	$141,350.00
Supplies, Material & Service	71,450.00
Capital Outlays	2,735.00
Total from Accident Fund	$215,535.00"

By virtue of sections 74 and 77, chapter 7, Laws of 1921, the control and management of this fund is placed in the hands of the director of labor and industries, and the supervisor of industrial insurance, appellants herein, to be disbursed in a manner prescribed by the workmen's compensation act. It will also be noted that appellants are not sued in their individual capacity, but in their official capacity as state officers.

In the case of *Lankford v. Platte Iron Works Co.*, 59 L. ed., page 316, it appears that an action was instituted by the appellee against the Oklahoma state banking board and J. D. Lankford, the state bank commissioner. It appears that the appellee was the

holder of two certain time certificates of deposit issued by a certain bank. Subsequently, the bank commissioner took charge of the bank and all of its assets, and proceeded to wind up its affairs. A demand was made for the payment of the certificates upon the banking board, and the commissioner, out of the depositors' guaranty fund of the state, but payment was refused. The banking law of the state of Oklahoma provided that if there should be not sufficient funds available for the purpose of paying depositors of a defunct bank, that the banking board should be required to issue certificates of indebtedness for the amount of the deposit, to be known as depositors' guaranty fund warrants of the state of Oklahoma, as provided by section 3, article 2, chapter 31, Session Laws of Oklahoma for 1911, and that the banking board be required to levy an assessment against the capital stock of each and every trust company organized and existing under the laws of Oklahoma for the purpose of increasing such depositors' guaranty fund and pay the depositors and the depositors' guaranty fund warrants of the state of Oklahoma. It was contended on behalf of the appellant that this is a suit against the state and that the appellants have no personal interest therein, and are being sued in their official capacity as agents of the state. On behalf of the appellee it was urged that this was not an action against the state, because an action against a state officer to compel him to perform duties prescribed by law is not an action against the state,

and that an officer who refused to obey the laws does not stand for the state within the meaning of the Federal Constitution. It is also asserted by the appellee that the depositors' guaranty fund is not under the executive and legislative control of the state and cannot be used by either for any purposes whatever, but can be used solely for the purpose of paying depositors of failed banks. The court then goes on to state that "where the state should vest the title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the state should commit it to the mere ministerial administration of the bank commissioner and banking board, and subject them to controversies with depositors, or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the state done?" The court then goes on to state that under the law the banking board is composed of the bank commission and three other persons, and that the board shall have supervision and control of the depositors' guaranty fund, which shall have power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of the fund. The fund is created by levying against the capital stock of each and every bank organized and existing under the laws of the state, by an annual assessment, the fund to be used solely for the purpose of liquidating deposits of failed banks and retiring warrants

provided for in the act, and if there be a deficiency, depositors' guaranty fund warrants may be issued, and an additional levy made against the member banks for the purpose of paying these certificates. And so it is insisted by the appellee that the plain commands of the statute, to which obedience is imposed and is necessary to fulfil the purpose of the law, which is to secure the full repayment to depositors, and therefore a suit by depositors is not a suit against the state, but a suit to compel submission by the officers of the state to the laws of the state, accomplishing at once the policy of the law and its specific purpose. In holding that this was, in fact, a suit against the state, the court said:

"There is strength in the contentions and we are not insensible to it, but there may be more complexity in fulfilling the scheme of the statute than the language of counsel exhibits, and it may be embarrassed if not defeated by subjecting the banking board to incessant judicial inquiries of its administration. We certainly cannot assume that it will not do its duty and provide the ultimate payment of all depositors. To this result the state makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors, and against other persons, which may be enforced by the state for the benefit of the fund which its law has created."

In discussing the case of *Murray v. Wilson Distilling Co.,* 213 U. S. 151, in the *Lankford* case, *supra,* the court said:

"The case, it is true, has some differences from that at bar. There the state was the owner of the

property committed to the commissioners for disposition, and was also the original debtor. Here the property is that of the contributing banks, and is accumulated in a fund for the security of their respective depositors. These are differences, but there are substantial resemblances. In that case officers were appointed to administer the property and liquidate and pay the demands against it, and this was the specific direction of the law, marking the beneficiaries, and apparently making them the exclusive parties in any proceedings to enforce the law. In this case officers are appointed having even a greater power. They are not only empowered to liquidate the deposits or other indebtedness of failed banks, but to levy assessments on other banks to make up any deficiency. Therefore, as the state was said to be a necessary party in the cited case, the state can be said to be a necessary party in the pending case because of its interest that the fund which it has caused to be created in pursuance of its policy shall be administered by the officers it has appointed rather than by judicial tribunals."

Again, in referring to the case of *State ex rel. Taylor v. Cockrell,* 27 Okla. 620, 112 Pac. 1000, in the *Lankford* case, *supra,* the court said:

"The title of such depositors' guaranty fund vests in the state, just as much so as the common school lands or the proceeds of the sale of the same * * * ."

"From this decision it appears that the law intended to give to the state as definite a title to the depositors' guaranty fund as to the common school fund * * * . In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund,

having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied."

Section 4 of the workmen's compensation act of the state of Washington, provides:

"If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the first day of February of the following year."

The analogy between the accident fund here involved and the state guaranty fund involved in the *Lankford* case, *supra,* may readily be seen. The accident fund is composed of premiums levied by the state in the nature of a tax by virtue of its police power for a specific purpose, namely, paying injured workmen and their dependents for injuries, and in case of any deficiency in any particular class in the accident fund, an additional levy may be made by the state for the purpose of taking care of this deficiency, and it is submitted that the state of Washington has as much title to the accident fund here involved as the state of Oklahoma had to the state guaranty fund involved in the *Lankford* case.

In the case of *State ex rel. Pierce County v. Superior Court,* 86 Wash. 685, it appeared that a taxpayer of Pierce County began an action in the superior court of Thurston County, making parties defendant, among others, C. W. Clausen, as State Auditor, and W. R. Roy, as State Highway Commis-

sioner, praying that a certain contract entered into between the county and the paving company be adjudged void, that work be stopped, and that the state highway commissioner be enjoined from certifying for payment to the state auditor any sum of money earned on the contract. This action was then instituted for the purpose of procuring a right of prohibition against the superior judge of Thurston County, seeking to prohibit him from proceeding further in the first action. In holding that this second action was, in fact, an action against the state, the court, on page 688, said:

"The suit in question, while in form a suit against certain of its executive officers in their representative capacities, is in essence and effect a suit against the state. The suit is instituted to restrain these officers, the one from certifying that certain sums payable out of the state treasury has been earned in the performance of a contract in which the state has an interest, and the other from drawing warrants on the state treasury for the payment of such certificates, if any are so presented to him. The funds involved are the funds of the state. The officers sought to be enjoined have no interest in the funds. They are merely the agents of the state by and through whom the state acts. They are not charged with acting in excess of the authority conferred upon them by law, nor is it charged that the law under which they are acting is for any reason void. The charge is, on the contrary, that a contract in which the state has an interest, and which, if valid, makes a charge upon the state's funds, is void because of fraud in its inception. Clearly we think such a suit, even though brought against its officer, must in effect be a suit against the state."

The language there used is applicable to the case at bar, as the funds here involved are funds of the state. The officers here have no interest whatever in the Accident Fund and merely act as agents of the state in the manner prescribed by state laws. Nor is it charged that they are acting in excess of their authority or that the law under which they are acting is void.

The case of *Oregon v. Hitchcock,* 202 U. S. 60, was an action instituted by the state of Oregon against Ethan A. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, to restrain them from allotting or patenting to any Indians, or other persons, certain lands in the Klamath Indian Reservation and praying that the title to such lands be decreed to be in the State of Oregon. In holding that this was, in fact, a suit against the United States, the court, on page 69, said:

"The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock, supra.* There, as here, a State was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the 'Red Lake Indian Reservation.' This suit is brought by a State against the same officers, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

"'Now, the legal title to these lands is in the United States. The officers named as defendants

have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.' "

So in the case at bar the appellants have no interest whatever in the outcome of this litigation, nor will it in any manner affect their interests. By the judgment in this case, appellants are ordered to deliver to appellee certain state warrants and also to show certain vouchers to appellee for which no warrants have been drawn. These warrants are drawn against a public fund in the state treasury, which consists of involuntary premiums exacted by the state by virtue of its police power from certain employers, and partake of the nature of a tax. It is thus readily seen that the only thing affected by this litigation is a state fund which will be materially lessened in case the appellee is successful. This will of necessity compel all employers of the state of Washington to pay a higher premium and will thus affect all the people of the State of Washington, as can readily be seen by

referring to the preamble of the Workmen's Compensation Act of this state, quoted *supra.*

In construing the South Carolina legislation controlling liquor, in the case of *Carolina Glass Co. v. South Carolina,* 240 U. S. 307 (314) the court said:

"Under the provisions of the Constitution (Art. VIII, Sec. 11) and statutes (25 Stat. 463) the county dispensaries are conducted 'under the authority and in the name of the State.' Therefore, the officers in charge of them are agents of the State and the funds arising from the sale of liquors through them are the funds of the State, and the debts due for goods sold to them are the debts of the State. In exercising the powers conferred upon it by the legislature, the Dispensary Commission is also the agent and representative of the State, 'subject to no interference, except that of the General Assembly itself,' and a suit brought against it is, in effect, a suit against the State. *State v. Dispensary Commission,* 79 S. Car. 316, 329, 60 S. E. Rep. 928."

In the case of *Pitcock v. State,* 91 Ark. 527, an action was instituted against the Superintendent of the State Penitentiary and other state officers to restrain them from violating the provisions of a contract. In holding that this was an action against the state, on page 538, the court said:

"This court in the *McConnell* case, *supra,* held that that was not a suit against the State because the Penitentiary Board had executed a valid and then subsisting contract with the plaintiff, but was attempting without legal authority to break it by a refusal to perform it. That distinction is untenable. The Penitentiary Board is created by statute as the agent of the State to manage and provide for working the convicts of the State. That board has the power

to make contracts for the State, and it is the sole agent of the State in the performance of such contracts. The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does for the State. The State can, under the present statute, make and perform contracts with reference to the management of convicts only through the agency of this board. Therefore, an injunction against the board restraining it from violating a contract necessarily results in requiring the board, and through it the State, to specifically perform its contract."

The duties of the appellants here are not ministerial in character, but their acts involve discretion to such an extent that they are quasi judicial in character, as evidenced by section 6604-20, Rem. 1915 Code, which reads in part as follows:

"Any employer, workman, beneficiary or person feeling aggrieved at any decision of the department affecting his interest may have the same reviewed by a proceeding for that purpose in the nature of an appeal initiated in the superior court of the county of his residence * * * * ."

In the case of *Lovett v. Lankford,* 145 Pac. 767, it appeared that the plaintiff deposited some moneys with a certain bank which was a member of the State Bank Guaranty Fund, which bank subsequently failed. An action was then instituted against the State Bank Commissioner to recover from the Guaranty Fund the amount of the deposit. In holding that this was an action against the state, the court, on page 769, said:

"It cannot be questioned that a judgment in this case in favor of plaintiffs in error would directly

affect the state and would, in effect, be a judgment against the state and would require the subjection of state funds to satisfy said judgment."

The State Guaranty Fund does not partake of the nature of a state fund as much as the Accident Fund here involved. The Guaranty Fund is composed of moneys voluntarily put up by member banks for the purpose of taking care of depositors of member banks that have failed, whereas the Accident Fund partakes of the nature of a tax and is involuntarily extracted from certain employers by the state by virtue of its police power.

In the case of *In re State of New York,* Sup. Ct. Rep. 41, p. 588, 256 U. S. 490, a libel was filed against three boats for damage caused by a collision, and damage was also asked against Ed S. Walsh, Superintendent of Public Works of the State of New York, who, it was alleged, was operating said boats. In holding this a suit against the state the court, on page 590, said:

"As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (*Osborn v. U. S. Bank,* 9 Wheat. 738, 846, 850, 857, 6 L. Ed. 204) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record. * * * *

"Thus examined, the decided cases have fallen into two principal classes, mentioned in *Pennoyer v.*

McConnaughy, 140 U. S. 1, 10, 11 Sup. Ct. 608 (35 L. Ed. 363):

"'The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts (citing cases). The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit * * * is not, within the meaning of the Eleventh Amendment, an action against the state.'

"The first class, in just reason, is not confined to cases where the suit will operate so as to compel the state specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability. *Smith v. Reeves,* 178 U. S. 436, 439, 20 Sup. Ct. 919, 44 L. Ed. 1140."

III

The Trading With the Enemy Act Does Not Apply to a State.

Assuming that this court should not agree with the two previous arguments, it is submitted that the provisions of the trading with the enemy act hereinafter quoted do not apply to a state.

The appellee claims authority to institute this action by virtue of subdivision C, section 7, of the Trading with the Enemy Act, *supra,* which reads as follows:

"If the president shall so require, any money or other property owing to, belonging to, or held for, by,

on account of, on behalf of, or for the benefit of an enemy, or ally of an enemy, not holding a license granted by the president hereunder, which the president, after investigation shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

Section 2, subdivision C, of the Trading with the Enemy Act, defines the word "person" as follows:

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic."

It will be contended that the phrase "body politic" includes a state. It is rather difficult to find any fixed definition for this phrase. In the case of *Warner v. Beers,* 23 Wend. 103 (121), the court said:

"Such associated bodies as were, in the language of the constitution, at the time of its adoption by the people in January, 1822, called *bodies politic and corporate,* had been known to exist as far back at least as the time of Cicero; and Gaius traces them even to the laws of Solon of Athens, who lived some five hundred years before. Pothier's Pand. of Just. Book 3, 109, Paris Ed. 1823. These associated bodies, or communities of individuals, with certain rights and privileges belonging to them by law in their aggregative capacity, were styled by the Romans *Collegium,* and sometimes *universitas;* as *Collegia Tibicinum, Collegia Aurificum, Collegia Architectorum;* the society, corporation or community of Flute Players, Goldsmiths, Architects, etc. Id. Book 20, p. 110. The terms used by one of the Roman jurisconsults to describe the nature of such a corporation, or associated body of individuals, under the laws of the republic, are perhaps as appropriate as any general language which can be used to describe a corporation

aggregate at the present day, without referring to the specific object for which any particular corporation is organized. I have thus translated it from the Latin of the Digest: 'But those who are permitted to form themselves into a body under the name of a corporation, society, or other community, have within their peculiar jurisdiction, as in a similar case of the republic, property in common, and a common chest or treasury, and an agent or head of the corporation or society, by whom, as in the republic, whatever is necessary to be done for the benefit of the community may be transacted.' "

Again in the case of *Coyle v. MacIntyre,* 40 Am. St. Rep. 109 (115), in defining this term, the court said:

"A municipal corporation may be defined to be a body politic, incorporated and established by law to assist in the civil government of the state, with delegated authority to regulate and administer the local or internal affairs of a city, town, or district which is incorporated.

" 'A body politic,' says Lord Coke, 'is a body to take in succession, formed as to its capacity by policy', and is therefore called by Littleton (secs. 4, 13) a body politic. It is called a corporation or body corporate because the persons are made into a body politic and are of capacity to take, grant, etc., by a particular name."

See also *Coyle v. Gray,* 30 Atl. 728 (731).

These definitions would seem to indicate that the legal subdivisions of a state were bodies politic, but not the state itself. Black's Law Dictionary defines a body politic as follows:

"A term applied to a corporation which is usually designated as a body corporate and politic. The term is particularly appropriate to a public corpora-

tion invested with powers and duties of government. It is often used in a rather loose way to designate the state or nation or sovereign power or government of a county or municipality, without distinctly connoting any express and individual corporate character."

Again, in 8 Corpus Juris, page 1137, we find the following text:

"A body politic is the collective body of a nation or state as politically organized or as exercising political functions; a corporation; a body to take in succession, framed as to its capacity by policy; it is formed by a voluntary association of individuals."

It will be noted that this definition states it is a collective body of a state or nation as exercising political functions, and not the state itself, there being a distinction between the government of a state and the state itself.

There is a distinction between the government and the state itself. In common speech and apprehension, they are usually regarded as identical and, as ordinarily the acts of the government are the acts of the state and come within the limits of its delegation of power, the government of the state is generally confounded with the state itself. The state itself, however, is an ideal person, intangible, invisible, immutable. The government is an agent and within the sphere of its agency, a personal representative. *Grunert v. Spalding,* 78 N. W. 606, citing and following *Poindexter v. Greenhow,* 114 U. S. 270.

We think it apparent, therefore, that if Congress had intended that the Trading with the Enemy Act

should apply to one of the states of this union, it would not have used the loose term "body politic," which seems to have no fixed definition, and which seems to be most often applied to legal governing bodies, but would have stated that the word "person" should be defined to include the state. In any event, when construing to include a state, one includes the collective body of a state, as politically organized, which is distinguishable from the state itself, which is, in fact, the appellant herein.

By virtue of section 16 of the Trading with the Enemy Act, *supra,* the district court is given jurisdiction to enforce the orders and demands of the Alien Property Custodian, with a right of appeal therefrom. If, as we contend, a state cannot be sued in the district court, it would seem to logically follow that Congress did not intend that this act should apply to a state, as it has provided no machinery to enforce demands against the state, which demands arose by reason of this special act, which was created for a special purpose.

IV

The Trading With the Enemy Act Is Not Applicable to a State Where Property Sought Is Not Reduced to Possession During the War.

The Workmen's Compensation Act of the State of Washington was enacted by virtue of the police power of the state. Preamble to chapter 74, Laws of 1911, *supra;* and *State v. Mountain Timber Com-*

pany, supra. Section 6604-10, Rem. 1915 Code, being a part of the Workmen's Compensation Act, provides in part as follows:

"No money paid or payable under this act out of the Accident Fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, or ever be taken in execution, or attached, or garnisheed, nor shall the same pass to to any other person by operation of law * * *."

It will thus be seen that this section is in direct conflict with certain portions of the Trading with the Enemy Act. The rule is well settled that where an act of Congress and a state statute are in conflict, the act of Congress is controlling if Congress has power to legislate on that particular subject; and it is equally well settled that the state alone has power to legislate on subjects relating to police power. *Hammer v. Dagenhart,* 247 U. S. 275; *Ex Parte Guerra,* 110 Atl. 224. However, this rule does not obtain in time of war or other great public peril, as shown by the following excerpt from *United States v. Hicks,* 256 Fed. 707:

"Accurately speaking, the conduct of the defendant is of that character which ordinarily could only come under the general police power constitutionally reserved to the states by the tenth amendment, and is not within the legislative power of Congress, except in time of war or other great public peril * * * *."

The reason for this exception to the states' sole right to legislate on subjects relative to the police power is that an emergency exists in time of war that

renders it necessary to the safety of the nation that Congress should have extraordinary powers to preserve the existence of the nation. However, when the reason for this exception ceases to exist, namely, at the end of the war, the exception itself no longer exists, and as no action was taken by the appellee to reduce his demand to possession until after the treaty of peace had been concluded, it is submitted that section 6604-10, *supra,* being a state police power measure, is controlling and that a congressional act passed during the war is no longer controlling over it after the emergency ceases to exist, to-wit, after the end of the war. This is a view taken by the supreme court of the United States in *Hamilton v. Kentucky Distilleries Company,* 251 U. S. 146. In that case it appeared that Congress had passed the war time prohibition act, the constitutionality of which was attacked. It was admitted that the United States lacks the police power, as shown by the following excerpt, on page 156:

"That the United States lacks the police power and that this was reserved to the states by the tenth amendment, is true." But it was contended that under the war time emergency, Congress had power to regulate and prohibit the liquor traffic, as shown by the following quotation from page 155:

"The constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power 'to make all laws which shall be necessary and proper for carrying into execu-

tion' the war powers expressly granted. Article I, section 8, clause 18."

It was there contended that inasmuch as the armistice had been signed, the emergency ceased to exist and that a congressional act on the police power, enacted by virtue of its war time power, was no longer controlling because the emergency ceased to exist, although in that particular case peace had not been formally declared by treaty, as it has in this. In answering this contention, on page 163, the court said:

"Conceding, then, for the purposes of the present case, that the question of the continued validity of the war prohibition act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid."

To recapitulate, it is therefore respectfully submitted,

1. That district courts do not have jurisdiction in an action wherein a state is a party.

2. That this is an action against the state.

3. That the Trading with the Enemy Act does not apply to a state.

4. That inasmuch as the emergency of war, in this case, had ceased to exist at the time this action was instituted, Congress has no power to pass an act in direct conflict with a state statute enacted by virtue of the police power of the state.

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